Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CL

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1766

SUNSET SCAVENGER COMPANY and
GOLDEN GATE DISPOSAL COMPANY,
Petitioners,

vs.

WILLIAM ROBERTS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

MARSHALL W. KRAUSE
1100 Sir Francis Drake Boulevard
Kentfield, California 94904
Telephone: (415) 457-6800
Attorney for Respondents

Of Counsel:
KRAUSE, BASKIN & SHELL
1100 Sir Francis Drake Boulevard
Kentfield, California 94904
Telephone: (415) 457-6800
GUNHEIM & YTURBIDE
San Francisco Penthouse East
1231 Market Street
San Francisco, California 94103
Telephone: (415) 626-3450

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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Respondents respectfully submit that the present petition should be denied for the reasons stated below.

ARGUMENT

I

Petitioners invite this Court to undertake a purely housekeeping function which is neither urgent nor wise in the present context.

The reasons for denying the petition are multiple. As we will demonstrate later, the existence of some conflict in the Circuits regarding the appealability issue is of no great concern in realistic terms. The present decision and the several others in accord with it are so clearly correct, and so worthy of allegiance in comparison with those to the contrary, that such conflict as truly exists is not likely to cause mischief of a dimension calling for this Court's intercession at this time. For that reason alone, the petition should be denied. However, we address now other considerations which counsel a denial even more cogently.

Petitioners exclusively pin their hopes for this Court's intercession on the conflict regarding appealability of a pretrial order denying class action certification. Near the end of the petition (p. 7), they make the bald, entirely unexplained suggestion that class treatment is "improper" here, but even that fleeting and sterile address to substance is one of a tangle of assertions concerning the supposed evils of a rule of appealability. They question only two sentences in the present decision or, more accurately, the companion opinion it makes controlling (included hereafter for the sake of simplicity in our use of "the present opinion"). Nowhere do they even attempt to debate the extensive analysis of the merits, including the conclusion that reversal and remand for redetermination are required because the District Court in denying class certification had both failed to consider the broad remedial purposes of Title VII of the subject Act and applied F.R.C.P. 23(a)(1) in an unduly restrictive manner.

In short, petitioners are not concerned with substance but aim solely at having this Court undertake a judicial housekeeping function which, if resulting in a rule of non-appealability, would leave the District Court's denial of class certification intact, without regard to its propriety. At best dubious in any context, such an approach is, we submit, transparently unsound where, as here, there is not only a lack of challenge on the merits, but the fact is that the Court of Appeals disposes of the merits in a manner guarding against dishonor to the policy or policies fundamentally at stake in the litigation.

In the last analysis, the object and the measure of appellate solicitude in this kind of case should be the vindication of the salutary and important policies sought to be advanced by Rule 23 and the statutory provisions against discrimination in employment. Class actions, significant to effective solutions in various fields, have no more vital role, perhaps, than their service in eradication of discriminatory employment practices based on race or other classwide traits. It is, indeed, with the importance of class actions in this field that the present opinion of the Court of Appeals largely deals, amply documented with the supportive teaching of this Court and others on the subject, as well as of Congress itself.

Accordingly, where, as in the case of the present opinion, pretrial determinations hospitable to class treatment are in issue, there is no compelling occasion for immediate and rigorous vigil against possible error. Such determinations, sound or not, protect in all events against premature frustration of the crucial policies fundamentally at stake. If the determinations are correct,

review at a higher level may well result only in delaying the trial and thus extending the time over which classwide discrimination in employment can be perpetuated. If such determinations are erroneous, the most that can happen from the excess of zeal in favor of class treatment is that the case will proceed to trial with aspects of overbreadth which, if managing to survive tailoring at the trial itself, can be remedied on appeal from the final judgment.

In sharp contrast, of course, stand pretrial determinations negating class treatment, whether they be in the form of a denial of certification in the first instance or of a refusal to review the denial on the ground of non-appealability. Those determinations threaten the underlying policies involved and, if erroneous, can defeat them irredeemably to some extent or even totally. Not only do they serve to predestine the narrower scope of subsequent discovery and other preparation for, presentation of proof at, and the result in the trial; they may remain uncorrected even after the trial, however erroneous and with serious consequences to class members who are not named plaintiffs, such as loss of the tolling effect of the suit upon statutes of limitations. This is so because the named plaintiffs may succeed in obtaining sufficient personal relief and, having been released from representative responsibility, may well choose not to pursue the class question on appeal from the final judgment.

It is submitted as apparent, that, with or without some conflict on the subject, the present appealability question does not rank so high in the hierarchy of national issues as to require this Court's intercession on that sole account at a preliminary stage of litigation. We note in

this connection that, recently and notwithstanding acknowledgment of conflict on the face of the opinion, this Court refused to intercede in the non-appealability case upon which petitioners mainly rely, *Williams v. Mumford,* 511 F.2d 363 (D.C.Cir. 1975), *cert. denied,* 423 U.S. 828 (1975). It is also respectfully suggested that there should be no dearth of opportunity in the relatively near future for such guidance on appealability as this Court deems appropriate in the course of resolving merits issues sufficiently important in their own right to have warranted this Court's attention. If, however, this Court is ever persuaded that the bare appealability question, without regard to merits, requires its pretrial consideration, wisdom dictates that this not occur in a context like the present one but where the holding below has been non-appealability of a denial of class certification and thus potentially frustrates the vital policies basically involved in this kind of litigation. The present opinion of the Court of Appeals, rather than militating against those policies, is conducive to their continued operation in the case. This Court's intercession now, if accomplishing nothing else of comfort to petitioners, would delay the trial inevitably and would thus be apt to contribute significantly to the longevity of practices which are alleged and may be found to constitute serious discrimination in employment. It is not amiss, indeed, to wonder whether such delay is not the very motivation of the present petition.

II

THE PRESENT HOLDING OF APPEALABILITY IS CLEARLY CORRECT

In regard to the conflict on appealability, the result in the present opinion is clearly in accord not only with preponderant authority squarely in point, but also with sound analysis under the criteria governing appealability generally.

It should be stressed that the present opinion goes no further than to hold that a denial of class certification is appealable under 28 U.S.C. §1292 (a)(1) because plaintiffs were seeking broad injunctive relief on behalf of a class, encompassing both restraint and affirmative action. That holding is, in fact, supported by the three earlier decisions of the Ninth Circuit cited in the present opinion. In addition, it is in accord with decisions of the First, Third, Fourth, and Fifth Circuits. (*Yaffe v. Powers,* 454 F.2d 1362, 1364-65 (1st Cir. 1972); *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 160 (3d Cir. 1975); *Hackett v. General Host Corp.,* 455 F.2d 618, 622 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972); *Brunson v. Board of Trustees,* 311 F.2d 107, 108 (4th Cir. 1962), *cert. denied,* 373 U.S. 933 (1963); *Jones v. Diamond,* 519 F.2d 1090, 1095-97 (5th Cir. 1975).)

One important justification for this result is that the practical effect of denying class status is to eliminate parties plaintiff and thus substantially narrow the injunctive relief obtainable. For example, in the Title VII setting, the class relief sought by the named plaintiffs typically includes, as here, not only other present co-workers, but even potential co-workers. Injunctive relief tailored to the named plaintiffs will not assure protection

of other co-workers or potential co-workers. In the unlikely, if not improper, event that, notwithstanding the denial of class treatment, the named plaintiffs succeed in obtaining an injunction going beyond their own needs and sufficient to protect all parties excluded by the denial, the excluded parties would still face the obstacle of showing standing to enforce the injunction.

Moreover, without pretrial appealability, improper denials of class certification could forever evade effective review because the named plaintiffs may realize sufficient personal success at trial and choose not to appeal on the question. Thus clear is the need of pretrial appeal to protect against injustice to excluded parties with respect to such concerns as the statute of limitations. Indeed, there is, at minimum, serious doubt as to whether, even if willing to pursue the class issue on appeal after a trial of the merits, the named plaintiffs could succeed in protecting wrongly excluded members of the class. There are decisions to the effect that class status must be certified in advance of the trial on the merits or otherwise comes too late to permit members the enjoyment of benefits from such status. (E.g. *Peritz v. Liberty Loan Corp.* 523 F.2d 349, 353-354 (7th Cir. 1975); *Roberts v. American Airlines* 526 F.2d 757, 762 (7th Cir. 1975); *Larionoff v. United States* 533 F.2d 1167, 1183 (D.C. Cir. 1976).)

In short, the cases favoring appealability have simply given the provision concerning injunctive relief a "practical" rather than a "technical" construction and mirror the view that any inconvenience incident to pretrial appeal is outweighed by "the danger of denying justice by delay." In so doing, they are faithful to the tests of

appealability which this Court has declared to be controlling even in the absence of the special grant of appellate jurisdiction set forth in section 1292 (a)(1). (E.g. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171 (1974); *Dickinson v. Petroleum Conversion Corp.* 338 U.S. 507, 511 (1950); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949).)

III

THE DECISIONS CITED BY PETITIONERS ARE CLEARLY ERRONEOUS

On the other side of the coin, the following suffices to illustrate the ill-considered and even superficial nature of the decision mainly relied on by petitioners, *Williams v. Mumford,* 511 F.2d 363 (D.C.Cir. 1975):

That decision, rather than taking the required "practical" approach, stresses the "technical" circumstance that denial of class certification is not, as such, either the issuance or the denial of an injunction. Apparently mindless that the elimination of parties plaintiff is involved together with the danger of substantive injustice discussed above, *Williams* adds (p. 370) the now-you-see-it-now-you-don't observation that, although the denying order might, at a later stage, have an "effect on the scope of the equitable relief," such orders in no way "touch on the merits of the claim."

This unfortunate reasoning seems to have flowed from the misguided notion that the denial of class certification is like the denial of a motion for summary judgment involved in *Switzerland Cheese Association, Inc. v. Hornes' Market,* 385 U.S. 23, 24 (1966). As this Court

there stressed, summary judgment was denied merely because "unresolved" factual issues remained. Nothing occurred to eliminate parties or narrow the scope of possible relief. The denial decided only that the case must go to trial.

Virtually worthless is the footnoted statement against pretrial appealability in the other case cited by petitioners, *Romasanta v. United Air Lines, Inc.,* 537 F.2d 915, 917 n. 3 (1976). The Court there upheld the right of a class member to intervene after settlement by the named plaintiffs. The fact basically stressed was that intervention was sought promptly after awareness that the named plaintiffs had no intention of appealing a prior denial of class certification. The footnoted remark concerning appealability was nothing but a casual makeweight, with neither attempt nor need to explore the point in any depth.

IV

PETITIONERS' ASSERTIONS OF EVIL ARE SPECIOUS

In response to petitioners' specious assertions of evil, we need only note that it is not appealability, but improper denial of class certification coupled with non-appealability, which emasculates Rule 23, as well as Title VII; that due respect for trial court discretion does not depend on whether review for abuse occurs before or after trial; that pretrial rulings of other types, including orders granting class certification, do not involve the same concerns as call for appealability of denials of such certification; and that nothing of relevance here is found in the language quoted by petitioners from *East Texas*

Motor Freight System, Inc. v. Jesse Rodriguez, et al., 45 U.S.L.W. 4524, 4527, which, of course, speaks only to the point that more than an allegation in the complaint is necessary to establish the required qualification of a plaintiff to represent a class.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MARSHALL W. KRAUSE
Attorney for Respondents

Of Counsel:
KRAUSE, BASKIN & SHELL
GUNHEIM & YTURBIDE

July 5, 1977